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In the

Supreme Court of the United States

October Term, 1988

WORKERS' COMPENSATION INSURERS RATING ASSOCIATION OF MINNESOTA, *et al.*,

Petitioners,

v.

AUSTIN PRODUCTS CO., *et al.*,

Respondents/Cross-Petitioners.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Under the proviso to § 2(b) of the McCarran-Ferguson Act[1] that the Sherman, Clayton and Federal Trade Commission Acts "shall be applicable to the business of insurance to the extent such business is not regulated by state law", are the enumerated antitrust laws applicable to a price-fixing agreement among insurance companies when the state has expressly deregulated the pricing practices of insurance companies and has adopted an explicit state policy favoring price competition?

2. Under § 2(b) of the McCarran-Ferguson Act is a price-fixing agreement among insurance companies entitled to exemption from the federal antitrust laws when the application of the antitrust laws to the price-fixing agreement would not "invalidate, impair or supersede any law enacted" by a state within the meaning of § 2(b)?

3. Is a defendant claiming exemption from the antitrust laws under § 2(b) of the McCarran-Ferguson Act required to present facts sufficient to support a finding that unregulated price-fixing is the "business of insurance" under the fact-based tests of this Court's decisions in *Royal Drug*[2] and *Pireno*[3]?

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[1] 15 U.S.C. § 1012(b)

[2] *Group Life and Health Insurance Company v. Royal Drug Company*, 440 U.S. 205 (1979).

[3] *Union Labor Life Insurance Company v. Pireno*, 458 U.S. 119 (1982).

THE PARTIES

Petitioners (defendants below) are (1) the Workers' Compensation Insurers Rating Association of Minnesota ("WCIRAM") which from 1921 to 1984 was an unincorporated association, initially created by State statute, to which each company selling workers' compensation insurance in Minnesota was by State law required to belong; and (2) the following insurance companies, each of whom (among others) sold workers' compensation insurance in Minnesota during the years 1979-1983: Aetna Casualty & Surety Co., Continental Insurance Co., Federated Mutual Insurance Co., Fireman's Fund Insurance Co., The Home Insurance Co., Liberty Mutual Insurance Co., Michigan Mutual Insurance Co., Sentry Insurance, a Mutual Company, St. Paul Fire & Marine Insurance Co., Transport Insurance Co., The Travelers Insurance Co., and Twin City Fire Insurance Co.

Respondents/Cross Petitioners (plaintiffs below) are A & M Moving & Storage Co., Austin Products Co., Briggs Transportation Co., Butterfield Foods Co., Town Down Foods Co. and the Diocese of Winona. Each plaintiff commenced an action on behalf of itself and a class of all others similarly situated against defendants alleging that plaintiff purchased workers' compensation insurance in Minnesota during the years 1979-1983. The six separate actions have been consolidated for all purposes. Class certification is pending.

STATEMENT PURSUANT TO RULE 28.1

Respondent Austin Products Co. is a privately held corporation organized under the laws of the State of Minnesota. It has no parent company, subsidiaries or affiliates.

Respondent A & M Moving & Storage Co., Inc. is a privately held corporation organized under the laws of the State of Minnesota. It has no parent company or subsidiaries and is affiliated with Delivery Service, Inc. and Roadrunner, Inc., both Minnesota corporations.

Respondents Tony Downs Foods Co. and Butterfield Foods Co. are privately held corporations organized under the laws of the State of Minnesota and are affiliated with each other. Neither has a parent company, any subsidiaries, or other affiliates.

Respondent Briggs Transportation Co. is a privately held corporation organized under the laws of the State of Minneosta. It has no parent company, subsidiaries or affiliates, and is now in liquidation under Chapter 7 of the Bankruptcy Code.

Respondent Diocese of Winona is a Minnesota religious corporation affiliated with the Catholic church and numerous local parishes within the Diocese. It has no parent company or subsidiaries.

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Respondents/Cross-Petitioners.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents/Cross-Petitioners respectfully ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on February 10, 1989.

OPINIONS BELOW

The opinion of the court of appeals is reported at 867 F.2d 1552 (8th Cir. 1989). The opinion of the district court denying defendants' motion to dismiss is reported at 574 F.Supp. 525 (D. Minn. 1983). The opinion of the district court, dated July 28, 1987, granting defendants' motion for summary judgment is not reported. All three opinions, together with the judgment of the court of appeals and other materials, are printed in the Appendix to Petitioners' initial Petition and are cited to herein as "Pet. App. at A____," and will not be separately reproduced herein.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1989. Petitioners' Petition for a Writ of Certiorari was docketed in the Supreme Court on May 11, 1989, and was received by counsel for Respondents/Cross-Petitioners on May 13. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1). The cross-petition is timely pursuant to Rule 19.5 of the Rules of the Supreme Court.

STATUTES AND RULES INVOLVED

The McCarran-Ferguson Act ("McCarran-Ferguson") § 2(b), 15 U.S.C. § 1012(b), provides in pertinent part as follows:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted in any State for the purpose of regulating the business of insurance... unless such Act specifically relates to the business of insurance; provided, that... the Sherman Act,... the Clayton Act, and the... Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The McCarran Act § 3(b), 15 U.S.C. § 1013(b) provides as follows:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

STATEMENT OF THE CASE

This Cross-Petition[4] presents questions[5] regarding the proper application of the limited antitrust exemption for the state-regulated business of insurance under § 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), in the context of the conscious de-regulation by the State of Minnesota of the pricing practices of insurance companies and the adoption of an express state policy favoring price competition in the market for workers' compensation insurance.

Prior to June, 1979 the State's policy was to require rate uniformity in workers' compensation insurance by prohibiting the use of rates other than those specified on a schedule of rates adopted by the Commissioner of Insurance. Minn. Stat. § 79.21 (1978). In 1979, as part of a comprehensive reform of the State's policies relating to workers' compensation insurance, the Minnesota Legislature enacted an amendment to Minn. Stat. § 79.21 (1978). Laws of Minnesota 1979, Sp. Sess. Ch. 3, § 11. Although the State retained a ratemaking procedure which led to the adoption of a schedule of rates by the Commissioner of Insurance, the rates so set were merely *maximum* rates. The State's policy as a result of the 1979 amendments was to favor price competition by permitting the use of rates less than the schedule of maximum rates specified

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[4]The factual and procedural background of this matter are well-summarized in the opinion of the court of appeals, 867 F.2d 1552 (Pet. App. at A3), and in the initial opinion of the District Court denying defendants motion to dismiss. 574 F.Supp. 525 (Pet. App. at A40), and will not be unnecessarily repeated herein. *See also* Respondents/Cross-Petitioners' Brief in Opposition.

[5]This cross-petition is conditional in nature and should only be considered if the Court is disposed to grant petitioners' initial petition. For the reasons set forth in Respondents/Cross-Petitioners' Brief in Opposition, the question presented by petitioners is not now appropriate for review in this Court. In particular, the interlocutory nature of the judgment of the court of appeals, and the presence of manifold disputed issues of fact, suggest that the issues raised by petitioners (and by respondents/cross-petitioners) may appropriately be reviewed, if at all, after a trial to resolve the disputed facts.

by the Commissioner. As the District Court (Magnuson, J.) found after reviewing the legislative history

> "It is clear that the purpose behind the amendment to Minn. Stat. § 79.21 was to permit competition in setting workers' compensation premiums, subject only to the ceiling established by the Commissioner."

574 F.Supp at 529 (Pet. App. at A46)[6].

In April, 1983 plaintiffs filed the first of these consolidated actions. The original Complaint (and a later Consolidated Amended Complaint) alleged that defendants entered into agreements in violation of the Sherman Act, 15 U.S.C. § 1, and the Minnesota Antitrust Act, Minn. Stat. §§ 325D.51 and 325D.53. The substance of the agreements was to fix, maintain and stabilize prices for workers' compensation insurance in Minnesota, and to boycott, coerce and intimidate other insurance companies and purchasers of workers' compensation insurance with the goal of enforcing or otherwise maintaining adherence to the fixed prices and excluding from the market potential price competitors.

Defendants immediately moved to dismiss plaintiffs' Complaint, claiming that their conduct and agreements were exempt from the Sherman Act under the McCarran-Ferguson Act. The district court denied defendants' motion, but opined that price-fixing is the "business of insurance", and that Minnesota appeared to regulate the business of insurance within the court's understanding of § 2(b) of McCarran-Ferguson. The district court, however, declined to dismiss plaintiffs' federal price-fixing claims, since those claims included claims of boycott, coercion and intimidation and therefore were not exempt under § 3(b) of McCarran-Ferguson. The district court also retained plaintiffs' pendent state antitrust claims.

After affording plaintiffs an opportunity to engage in limited discovery, the District Court (Rosenbaum, J.) granted defendants' motion for summary judgment. In doing so the court adopted the prior opinion of Judge Magnuson, and then found that there were insufficient facts to support plaintiffs' claims of acts or agreements to boycott, coerce and intimidate.

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[6] As the District Court noted, Minnesota's decision to foster competition in insurance was part of a national trend favoring de-regulation. 574 F.Supp. at 529 n.6 (Pet. App. at A46).

On appeal, the Court of Appeals for the Eighth Circuit reversed, in part, and vacated, in part, the judgment of the district court, and remanded the case for trial. The panel majority (Lay, Chief Judge, and Brown, Senior Circuit Judge) agreed with Judge Magnuson's initial ruling that price-fixing is part of the "business of insurance", and was "regulated by state law" within the meaning of § 2(b) of McCarran-Ferguson. 867 F.2d at 1555–60 (Pet. App. at A9–18). The panel majority found, however, "overwhelming evidence" to support plaintiffs' claims of acts or agreements to boycott, coerce and intimidate and therefore reversed the judgment of the district court. 867 F.2d at 1567 (Pet. App. at A34).[7]

In a concurring opinion, Circuit Judge Beam stated that he would have gone further, and would have held that

> "... the facts of this case compel the conclusion that the State of Minnesota did not 'regulate' workers' compensation insurance pricing practices within the meaning of McCarran-Ferguson."

867 F.2d at 1569 (Pet. App. at A37–38)

REASONS FOR GRANTING THE WRIT

In the event the Court grants the petition of Petitioners, the Court should also grant the cross-petition of Respondents/Cross-Petitioners. The questions presented in the cross-petition are important questions of federal law which have not been, but should be, settled by this Court. The insurance industry is a large and crucial component of the nation's economy. The court of appeals' (and other courts') broad reading of the "state regulation" element of McCarran-Ferguson creates an overly expansive antitrust exemption that permits harmful anticompetitive practices which the Congress, in enacting McCarran-Ferguson, never intended to immunize.

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[7]The panel majority repeatedly emphasized the strength of plaintiffs' evidence. "We find ample evidence of a boycott..." 867 F.2d at 1561 n.15 (Pet. App. at A21), "convincing evidence" *Id.* at 1565 (Pet. App. at A28), "We find a plethora of other evidence..." *Id.* at 1566 (Pet. App. at A32).

In addition, the failure of the district court and the court of appeals to require defendants to present facts sufficient to support a finding that unregulated price-fixing is the "business of insurance" under the fact-based tests of this Court's decisions in *Royal Drug, supra* and *Pireno, supra* is contrary to the intent of those decisions, and is contrary to the interpretation of those decisions by the lower Courts.

I. The Conduct Challenged By Plaintiffs Is Not Regulated By State Law.

The proviso to § 2(b) of McCarran-Ferguson provides in relevant part that the federal antitrust laws

> "... shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

15 U.S.C. § 1012(b).

This Court has addressed the "state regulation" test of § 2(b) only once, in a *Per Curiam* decision in *Federal Trade Commission v. National Casualty Co.*, 357 U.S. 560 (1958). In *National Casualty* the Court agreed with the plaintiff insurance companies that McCarran-Ferguson barred the FTC from attempting to regulate false and misleading advertising in states that had statutes which specifically regulated such false and misleading advertising practices.

In the instant case, plaintiffs argued below that the mere presence of a general scheme of regulation was insufficient to satisfy the "state regulation" test, particularly in the context of Minnesota's intentional de-regulation of the pricing of workers' compensation insurance. While the panel majority acknowledged that the legislative history of the McCarran-Ferguson Act "strongly suggests" that plaintiffs' arguments were correct, 867 F.2d at 1559 (Pet. App. at A16) and that plaintiffs' arguments "contain logical appeal", *Id.*, the panel majority felt constrained by *National Casualty*, and held:

> "As the state regulation does not appear in the form of state rate setting, as contemplated by The McCarran-Ferguson Act, the alleged price fixing agreement would

> appear to violate federal law. However, the reason defendants are not subject to *per se* liability for price fixing under the federal antitrust laws is because the state has retained 'inchoate' regulation over unfair methods of competition. *FTC v. National Casualty*, 357 U.S. at 564-65, 78 S.Ct. at 1262."

867 F.2d at 1559-1560 (Pet. App. at A17).

In his concurrence Judge Beam argues persuasively that the panel majority misapplied the decision in *National Casualty*. 867 F.2d at 1568-1570 (Pet. App. at A35-39).[8] Judge Beam agreed with plaintiffs that the over-riding feature of this case is "Minnesota's intentional deregulation of workers' compensation rates..." 867 F.2d at 1569 (Pet. App. at A38), which compels the conclusion that "Minnesota does not 'regulate' these rates for purposes of application of McCarran-Ferguson." *Id.* As Judge Beam noted

> "To hold otherwise reaches a truly ironic result. If the amended statutory scheme is deemed to constitute "regulation" under McCarran-Ferguson, then the very statute intended to deregulate rates and encourage price competition would work to displace the obligation to compete imposed by federal antitrust laws. Such a result certainly was not intended by those who implemented the amended statute, nor is such a result consistent with the purpose of McCarran-Ferguson."

Id.

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[8]For a thorough analysis of how the lower courts have misconstrued and misapplied the decision in *National Casualty*, and have ignored the legislative history of McCarran-Ferguson, see the dissent of Judge Godbold in *Crawford v. American Title Insurance Co.*, 518 F.2d 217 (5th Cir. 1975). The expansive reading of the "state regulation" test by the lower courts has been criticized by commentators as well. *See e.g.* Sullivan & Wiley "Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason" 27 U.C.L.A. L.Rev. 265, 288-291; Weller "The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy" 1978 Duke L.J. 587, 612-613. Professor Sullivan suggests in his article that this Court's decisions in *Royal Drug, supra* and *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978) are inconsistent with the treatment of "state regulation" by the lower courts.

The expansive reading of the "state regulation" test by the court of appeals, coupled with the national trend toward de-regulation of insurance, provide a persuasive reason for this Court to grant the Cross-Petition to address this important issue. In its very first decision construing McCarran-Ferguson this Court stated:

> "It would be a shocking thing, if state and federal governments acting together were prevented from achieving the end desired by both, simply because of the division of power between them."

Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 439 n. 52 (1946)[9].

In the event that Petitioners' Petition for Certiorari is granted, the Court should also grant the Cross-Petition to consider the applicability of § 2(b) of McCarran-Ferguson in the context of intentional de-regulation by a state.

II. Application Of The Antitrust Laws To The Conduct Challenged By Plaintiffs Will Not "Invalidate, Impair, Or Supersede" Any State Law.

Section 2(b) of McCarran-Ferguson provides:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted in any State for the purpose of regulating the business of insurance... unless such Act specifically relates to the business of insurance; provided, that... the Sherman Act,... the Clayton Act, and the... Federal Trade Commission Act,

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[9]The State of Minnesota as Amicus Curiae in the Court of Appeals argued that the proper construction of McCarran-Ferguson, and the proper interpretation of *National Casualty*, urged by plaintiffs, would enable states with policies favoring price competition in insurance to channel their resources in regulating certain aspects of the business of insurance, and to have that regulation assisted and supplemented by enforcement of the antitrust laws. Brief of the State of Minnesota as Amicus Curiae at 13. The overly broad interpretation of McCarran-Ferguson and *National Casualty* would force states that favor price competition in insurance to regulate every aspect of insurance, or have no regulation at all. *Id.*

> as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

This Court has explicitly applied the "invalidation test".[10] In *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453 (1969) the Court held that the McCarran-Ferguson Act did not preclude that application of the federal securities laws to the challenged conduct because there was no conflict between said laws and state statutes regulating the "business of insurance." The Court stated:

> "It is clear that any 'impairment' in this case is a most indirect one. The federal government is attempting to protect security holders from fraudulent misrepresentations; ... Arizona has not commanded something which the federal government seeks to prohibit... In these circumstances, we simply cannot see the conflict."

Id. at 463.

Two courts of appeals have applied the "invalidation test" in antitrust cases. In *United States v. Crocker National Corp.*, 656 F.2d 428 (9th Cir. 1981), *reversed on other grounds, sub. nom. Bankamerica Corp. v. U.S.*, 462 U.S. 122 (1983), the Ninth Circuit Court of Appeals agreed with the Department of Justice and rejected the insurance companies' argument that under McCarran-Ferguson they were exempt from the application of the antitrust laws. After reviewing the relevant state statutes the court held:

> "... application of Section 8 of the Clayton Act to these interlocks [would not] 'invalidate, impair, or supersede' these state statutes...
>
> This conclusion is supported by the general principle that coordinate federal and state authority should be accommodated when possible and the inferior law should

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[10] As used herein "invalidation test" refers to the "invalidate, impair or supersede" language of § 2(b).

be preempted only to the extent necessary to accomplish the purpose of the law that is supreme."

656 F.2d at 453–454 [emphasis supplied].

In a footnote the court noted that:

> "The legislative history of the McCarran-Ferguson Act indicates the Congress intended this principle to apply under the Act. Legislation to exempt the insurance industry completely from the antitrust laws passed the House, but died in the Senate. [citation omitted]. The legislation that became the McCarran-Ferguson Act was introduced a year later. It rejected total exemption and instead required only that the antitrust laws not be construed to 'invalidate, impair, or supersede' any state law enacted for the purpose of regulating the business of insurance [citations omitted]... *At a minimum, therefore, the federal antitrust laws apply to the extent they do not 'invalidate, impair, or supersede' state law.* [citation omitted]."

Id. 656 F.2d at 454, fn. 89. [emphasis supplied].

A similar analysis was advocated by the Federal Trade Commission, and adopted by the court, in *American General Ins. Co. v. F.T.C.*, 359 F.Supp. 887 (S.D. Tex. 1973) *aff'd*, 496 F.2d 197 (5th Cir. 1974).

The legislative history, as well as the syntax, of Section 2(b) also demonstrate that the proviso was meant to *narrow* the "invalidation" test of the first clause. The version of Section 2(b) passed by the House provided:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such busines, unless such Act specifically so provides."

91 Cong. Rec. 1085.

The Senate version of Section 2(b) provided:

> "No act of Congress, *except the act of July 2, 1890, as*

> *amended, known as the Sherman Act, and/or the act of October 15, 1914, as amended, known as the Clayton Act,* shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides."

91 Cong. Rec. 488 [emphasis supplied].

The Conference Committee then had to compromise between the Senate version, which would have applied the Sherman and Clayton Acts to the business of insurance *even if* those Acts invalidated, impaired or superseded a state law, and the House version, which would have applied the Sherman and Clayton Acts *only* when to do so *would not* invalidate, impair or supersede a state law.

The compromise adopted by the Conference Committee, the proviso to Section 2(b), was truly that, a half-way measure between the Senate and House positions. Thus, the burden is on the defendant claiming exemption to identify a particular state law regulating the "business of insurance" which would be impaired, invalidated or superseded by application of the Sherman and Clayton Acts. Defendants below did not do so, because, far from impairing Minnesota laws, application of the antitrust laws in this case is consistent with, and promotes, the state policy favoring competition in the pricing of premiums for workers' compensation insurance.

The court of appeals referred to, but implicitly rejected, the application of the "invalidation test" in this case. 867 F.2d at 1552 (Pet. App. at A16). The court apparently agreed with the argument advanced by defendants below that the "invalidation test" has no application in antitrust cases, and that McCarran-Ferguson immunizes anticompetitive activities even when the application of the federal antitrust laws to those activities would not "invalidate, impair, or supersede" a law enacted by a state for the purpose of regulating the "business of insurance".

Since the decision of the court of appeals below places it in conflict with two other courts of appeals (*Crocker, supra* and *American General, supra*) and places it in conflict with the inter-

pretation of McCarran-Ferguson advocated by the Department of Justice and the Federal Trade Commission in those cases, in the event that Petitioners' Petition for Certiorari is granted, the Court should also grant the Cross-Petition to consider the applicability of the "invalidation test" in § 2(b) of McCarran-Ferguson in antitrust cases.

III. In The Absence Of A Factual Record An Unregulated Private Price-Fixing Agreement Cannot Be Found To Be The "Business Of Insurance".

In *Group Life & Health Insurance Company v. Royal Drug Company*, 440 U.S. 205 (1979) and *Union Labor Life Insurance Company v. Pireno*, 458 U.S. 119 (1982) this Court identified three fact-based tests for determining whether a challenged anti-competitive practice was nonetheless exempt from the antitrust laws under McCarran-Ferguson. These criteria are:

> "*First*, whether *the practice* has the *effect* of transferring or spreading a policyholder's risk; *second*, whether *the practice* is an integral part of the policy relationship between the insurer and insured; and *third*, whether *the practice* is limited to entities within the insurance industry."

Pireno, supra 458 U.S. at 129 (citing *Royal Drug*) [emphasis supplied].

In 1985 the Court re-affirmed the applicability of these criteria. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985).

The lower courts which have considered this issue since *Pireno* have explicitly recognized that a *factual* determination is necessary with respect to the three *Pireno* tests. *See e.g., Maryland v. Blue Cross and Blue Shield Ass'n.*, 620 F.Supp. 907 (D.Md. 1985); *Reazin v. Blue Cross and Blue Shield of Kansas*, 663 F.Supp. 1360 (D.Kan. 1987). In the *Maryland* case, after extensive discovery and conflicting evidence, the court determined that there were material facts in dispute with respect to whether the defendants'

conduct (a horizontal market allocation agreement) either "transferred" or "spread" risk, and with respect to whether such conduct was an "integral part of the policy relationship between the insurer and the insured". Therefore, the court denied defendants' motion for summary judgment. *Id.* at 922.

In *Reazin*, the court stated:

> "Congress provided only a qualified antitrust immunity for insurance companies through the McCarran Act. Courts have carefully defined the "business of insurance" requirement to effect the limited congressional purposes behind the act, and *for the same reasons consistently use a fact-based conduct analysis to determine whether that requirement is met in a particular case.*"

Reazin, supra at 1402 [emphasis supplied].

The error made by the district court and the court of appeals is that, although the three factors were identified, they were not applied. The district court apparently believed the factors did not need to be applied in this case since *Royal Drug* and *Pireno* involved what the court characterized as "ancillary activities", while the conduct at issue in the instant case is blatant price fixing. 574 F.Supp. at 530 (Pet. App. at A47). The court of appeals, despite the absence of *any* factual support in the record, found that:

> "... fixing of rates by the compensation carriers, whether by private or by state-approved rate-setting, is integral to the price charged to policy holders and to the contractual relationship with the insured. Although a price-fixing agreement may maximize profit, it is axiomatic that the fixing of rates is central to transferring and spreading the insurance risk."

867 F.2d at 1556 (Pet. App. at A11).

Under *Pireno, supra* 458 U.S. at 126, the burden of establishing the applicability of the McCarran-Ferguson exemption is upon the party asserting it. In the absence of evidence in the record to support a finding that a private, unregulated price-fixing agreement either spreads or transfers risk, or is an integral part of the policy relationship between the insurer and insured, it is error to conclude that such an agreement is the "business of insurance".

Under these circumstances, if the Court grants Petitioners' Petition for Certiorari, the Court should also grant the Cross-Petition to determine if defendants satisfied their burden of demonstrating that the challenged conduct is the "business of insurance".

CONCLUSION

This case raises the fundamental question, never before answered by this Court, of whether § 2(b) of the McCarran-Ferguson Act exempts from the application of the federal antitrust laws, a private, unregulated price-fixing agreement in a State which has a clearly expressed policy favoring price competition in insurance. A proper reading of McCarran-Ferguson, its legislative history, and this Court's prior interpretations thereof, compels the conclusion that such a private agreement, in such a state, is not the "business of insurance", is not "regulated by state law" and, in any case, the application of the antitrust laws in such circumstances does not "invalidate, impair or supersede any law enacted in any State for the purpose of regulating the business of insurance".

In view of the escalating trend in the states towards de-regulation of the insurance industry, should this Court grant Petitioners' Petition for Certiorari the Court should also grant the Cross-Petition in order to review these important issues.

For the foregoing reasons, the Cross-Petition for Certiorari should be granted.

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Respectfully submitted,

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